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Property--Fee Simple Determinables--Distinguishing Characteristics

James Alan Harris
West Virginia University College of Law

burden of proof could be shifted to the defendant publisher to prove that he had a reasonable belief in the truth or probable truth of the matters asserted in the publication and that he made a good faith investigation to determine the validity of the information. The issues of reasonable belief and good faith investigation could be questions for the jury. A jury determination that the publisher did act in good faith would mitigate damages, or—if the publisher's evidence is strong enough—could even absolve the publisher of liability. Proof of malice could be reserved for those cases in which the plaintiff is unable to definitely establish the falsity of the communication and the defendant is likewise unable to definitely establish the truth of the matters. The establishment of these proposed standards would certainly put no unreasonable burden on the publisher, in that the proposed test would not demand more than responsible publishers already do.

James H. McCauley

PROPERTY—FEE SIMPLE DETERMINABLES—DISTINGUISHING CHARACTERISTICS

The purpose and scope of this note is to define and distinguish the estate variously referred to as a base, qualified, or determinable fee and its correlative future interest, the possibility of reverter, from other similar fee simple estates and future interests.

Because the estate under consideration has been referred to by many different names,[1] it may be best to define the estate first and then attach to that definition an appropriate name. The estate discussed here can be defined succinctly as an estate in fee simple which automatically expires upon the occurrence of a stated event.[2] As

[1] The estate herein defined has been variously referred to as a base or qualified fee, a fee simple defeasible, a fee simple determinable, or a fee simple subject to a condition subsequent. *In Re* Pruner's Estate, 400 Pa. 629, 162 A.2d 626 (1960). Such an indiscriminate use of terms to describe the estate has led to confusion in the cases when an attempt is made to analyze and define it and it makes the task of the practitioner who is researching in this area most difficult. The authors of American Law of Property suggest that this estate should be referred to as a "fee or limitation or collateral limitation." 1 AMERICAN LAW OF PROPERTY § 2.6 (A.J. Casner ed. 1952). However, the other authorities have preferred to refer to it as a "determinable fee." 1 L. SIMES and A. SMITH, THE LAW OF FUTURE INTERESTS § 17 (2d ed. 1956).

[2] Lehigh Valley R. R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961). *But see* Dingess v. Drake, 135 W. Va. 502, 64 S.E.2d 601 (1951); Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946).

this definition suggests, such an estate is created by a limitation which creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event.[3] For the purposes of this discussion, such an estate will be referred to as a fee simple determinable. This designation seems to be preferable to others which have been suggested and more descriptive of the property interest involved because the estate is of such a nature that it may last forever, and thus is a fee simple. But because it may terminate automatically on the happening of a stated event, it is determinable.[4] Obviously this definition alone is of little benefit without a knowledge of the characteristics of the fee simple determinable.

The fee simple determinable has all the attributes of a fee simple absolute except for the fact that it is subject to being terminated automatically upon occurrence of the event on which it is limited.[5] It will descend on the death of the owner intestate and can be devised or conveyed before the event on which it is limitd occurs.[6] Of course, one who acquires such an estate by descent, devise, or conveyance does so subject to the defeasible nature of the estate;[7] and, in any event, on the occurrence of the event on which the estate is limited, it terminates automatically without any act on the part of the person who is then to take the estate.[8]

No particular words are necessary for the creation of a fee simple determinable, and any appropriate words showing the intent of the testator or grantor to create an estate in fee simple that will expire automatically on the occurrence of the event upon which it is limited will suffice.[9] However, certain words have traditionally been considered to indicate an intention to create a fee simple determin-

[3] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963), citing RESTATEMENT OF PROPERTY § 44 (1936).

[4] First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946).

[5] Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855); Mountain City Missionary Baptist Church v. Wagner, 193 Tenn. 625, 249 S.W.2d 875 (1952); King County v. Hanson Inv. Co., 34 Wash. 2d 112, 208 P.2d 113 (1949).

[6] Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); Dingess v. Drake, 135 W. Va. 502, 64 S.E2d 601 (1951).

[7] Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); Dingess v. Drake, 135 W. Va. 502, 64 S.E2d 601 (1951).

[8] Consolidated School Dist. No. 102 v. Walter, 243 Minn. 159, 66 N.W.2d 881 (1954); Myers v. Milton, 148 W. Va. 789, 137 S.E.2d 441 (1964).

[9] McDougall v. Palo Alto Unified School District, 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); P.C.K. Properties Inc. v. Cuyahoga Falls, 112 Ohio App. 492, 176 N.E.2d 441 (1960). In the latter case, the court

able. Such words usually suggest a duration of time.[10] Thus, normally the words which are considered to create a fee simple determinable are "so long as," "during," "until,"[11] and, in a number of cases, "when" or "whenever."[12]

Later cases in construing estates created by deed or will have given less weight to the language used in the creation of an estate, and have, instead, emphasized that the intention of the parties to the instrument should be the determinative factor in the process of construction.[13] This is particularly true when the question is whether particular words in a deed or will create a fee simple determinable or a fee simple subject to a condition subsequent.[14] Thus, it has been said that in such a case if the purpose is to compel compliance with

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found no intent on the part of the grantor to convey less than a fee simple absolute even though the deed in question used words which are normally considered to be adequate to grant a fee simple determinable. Apparently, this decision resulted from the fact that the grantee was a public entity, and in such cases a court is hesitant to terminate or forfeit estates. *Id.* at 495, 176 N.E.2d at 444.

[10] Lehigh Valley R. R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962).

[11] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); P.C.K. Properties, Inc. v. Cuyahoga Falls, 112 Ohio App. 492, 176 N.E.2d 441 (1960). Limiting phrases which stated, in effect, that the property granted was to be used for a specified purpose and for no other purpose have been held insufficient to create a fee simple determinable, and in such a case a fee simple absolute passed. Scott County Bd. of Educ. v. Pepper, 311 S.W.2d 189 (Ky. 1958); Duncan v. Academy of the Sisters of the Sacred Heart, 350 S.W.2d 814 (Mo. 1961). However, there appears to be a conflict of authority on the question of whether or not such a phrase is adequate to debase an otherwise valid transfer of a fee simple absolute to a fee simple determinable. *See* 28 AM. JUR. 2d *Estates* § 31 (1966).

[12] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963) ("And whenever the said parties of the second part shall abandon the premises . . . for school purposes . . . then and in that event said premises shall revert to the said party of the second part. . . ."); Consolidated School Dist. No. 102 v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954) ("whenever said School House ceases to be used . . . then the said Trust shall cease and determine and the said land shall revert. . . ."); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962).

[13] Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962); P.C.K. Properties Inc. v. Cuyahoga Falls, 112 Ohio App. 492, 176 N.E.2d 441 (1960). The court in the *Oldfield* case said that "[t]he universal touchstone today is the intention of the parties to the instrument creating the interest in land." Oldfield v. Stoeco Homes Inc., *supra* at 257, 139 A.2d at 297.

[14] *See* Consolidated School Dist. No. 102 v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954). An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple, and (b) provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created. RESTATEMENT OF PROPERTY § 45 (1936).

a condition by the penalty of forfeiture, a fee simple subject to a condition subsequent arises, but if the intent is to give the estate for a stated use with the estate to expire automatically when the particular use or purpose ceases, then a fee simple determinable is created.[15] It would seem that if this approach is taken to such a problem, then regardless of language of condition, if the prevailing purpose of the testator or grantor is to give the property so long as it is needed for a stated purpose and no longer, and not to enforce a condition by a threatened forfeiture, a fee simple determinable would result.[16]

In the construction of deeds and wills the courts prefer to find that a particular instrument has created a fee simple subject to a condition subsequent rather than a fee simple determinable for the reason that the latter estate is terminated automatically on the occurrence of the event on which it is limited while the former estate remains a fee undisturbed in the hands of the grantee until the one entitled to do so elects to terming the estate.[17] In addition, the defenses of waiver and estoppel which are applicable to the free simple subject to a condition subsequent have no application to the fee simple determinable.[18]

Many courts have declared that no express provision in a deed or will that the fee simple determinable shall revert to the grantor, testator, or the heirs of either is necessary in order to create such an estate,[19] but it is clear that a mere statement in the deed or will of the purpose for which the property is devised or conveyed will

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[15] School District No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964); Consolidated School Dist. No. 102 v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954); 1 AMERICAN LAW OF PROPERTY § 2.6 (A.J. Casner ed. 1952).

[16] 1 AMERICAN LAW OF PROPERTY § 2.6 (A.J. Casner ed. 1952).

[17] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958). Language of condition in an instrument facilitates the adoption of such a preference and rejection of a holding that a fee simple determinable has been created. McDougall v. Palo Alto Unified School Dist., *supra* at 435, 28 Cal. Rptr. at 44. Likewise, conditions subsequent in an instrument are not favored, and if there is doubt as to whether a phrase in a deed or will creates a condition or a covenant, the latter will always be adopted. Thus,

> [a] condition subsequent must be created by express terms or clear implication. Even where apt words are used for the creation of a condition, yet in the absence of express provisions for re-entry or forfeiture, the court will not declare that a condition has been created, but will look to the whole deed, the relation and situation of the parties and the acts to be performed, and will determine the true intent of the parties. Sands v. Holbert, 93 W. Va. 574, 578, 117 S.E. 896, 897 (1923).

[18] Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958).

[19] 28 AM. JUR. 2d *Estates* § 32 (1966).

not operate to create a fee simple determinable.[20] However, the absence of a reverter clause in a deed or will is often considered to indicate that the grantor or testator did not intend to create a fee simple determinable.[21] Thus, as a practical matter, this suggests that the practitioner who wishes to draft an instrument for one who wants to devise or convey a fee simple determinable should make the intent of such person clear by using the appropriate words for the creation of such an estate, by stating the purpose or use for which the property is being devised or conveyed, and by including in the instrument a provision for reverter.[22]

The fee simple determinable is distinguishable from the fee simple subject to a condition subsequent on the theoretical basis previously noted,[23] and is also factually and legally distinguishable from the fee simple subject to a condition subsequent. First, as its name suggests, a fee simple subject to a condition subsequent is usually created by the use of words importing a condition such as "on condition that," "provided that," "but if," and words of like import.[24] However, the principal distinction between the two estates lies in the fact, as mentioned previously, that on the occurrence of

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[20] Lynch v. Cypert, 227 Ark. 907, 302 S.W.2d 284 (1957); Light v. Third-Woodland Presbyterian Church, 311 S.W.2d 386 (Ky. 1958); Scott County Bd. of Educ. v. Pepper, 311 S.W.2d 189 (Ky. 1958); P.C.K. Properties Inc. v. Cuyahoga Falls, 112 Ohio App. 492, 176 N.E.2d 441 (1960); Roadcap v. County School Bd., 194 Va. 201, 72 S.E.2d 250 (1952); Garrett v. Bd. of Educ., 109 W. Va. 714, 156 S.E. 115 (1930).

[21] Light v. Third-Woodland Presbyterian Church, 311 S.W.2d 386 (Ky. 1958); Duncan v. Academy of the Sisters of the Sacred Heart, 350 S.W.2d 814 (Mo. 1961); First New Jerusalem Church v. Singer, 68 Ohio App. 119, 34 N.E.2d 1007 (1941). Conversely, the presence of a provision that title shall revert to the grantor or the heirs of the grantor or testator will lead a court to find that a fee simple determinable was intended to be created. *See* Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); 28 AM. JUR. 2d *Estates* § 32 (1966).

[22] In Sands v. Holbert, 93 W. Va. 574, 117 S.E. 896 (1923), the West Virginia Supreme Court of Appeals considered whether the language of a deed created a fee simple absolute or a lesser estate. The court said that:

> From an inspection of the deed it is evident that it was carefully prepared by one learned in the law and an expert draftsman and if it was the intention of the grantor that there should be a reverter of title or a forfeiture of the estate if the building was not erected, then there should have been plain, unequivocal and certain words to that effect. *Id.* at 583, 117 S.E. at 900. The following example would be sufficient to create a fee simple determinable: To *A* so long as it is used for *specified purposes,* and if it should ever cease to be used for said purposes it shall, by operation of law, revert to the grantor or his hiers.

[23] See text accompanying note 15 *supra.*

[24] Scott County Bd. of Educ. v. Pepper, 311 S.W.2d 189 (Ky. 1958); Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); P.C.K. Properties Inc. v. Cuyahoga Falls, 112 Ohio App. 492, 176 N.E.2d 441 (1960).

the event on which the fee simple determinable is limited it expires automatically while the fee simple subject to a condition subsequent does not terminate until the one entitled to do so exercises the right of re-entry for condition broken.[25]

Although the foregoing discussion may have implied that a fee simple determinable can only be created in real property, this is not the case; and an estate in the nature of a fee simple determinable can be created in personal property.[26]

Obviously, a fee simple owner of property who devises or conveys an estate in property which may terminate on the occurrence of a stated event has not disposed of all of his interest in the property. The interest which he or his heirs retain is usually referred to as a possibility of reverter.[27] The requirements for the creation of a possibility of reverter are the same as those for the creation of a fee simple determinable[28] because the former is a correlative of the latter, and arises by implication when a fee simple determinable is created.[29] It need not be expressly reserved[30] and is considered to be an existing interest in land and not a mere possibility that an interest will arise in the future.[31] Although it is a future interest contingent in nature,[32] the possibility of reverter, like a right of re-entry for condition broken, is held not to be subject to the rule against perpetuities.[33] Explanations of this rule have been given as follows: the rule against perpetuities applies only to contingent estates, and since the possibility of reverter is not considered an

[25] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855); Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961); Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959); Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); Stewart v. Workman, 85 W. Va. 695, 102 S.E. 474 (1920). An actual re-entry is no longer necessary, and an action of ejectment is a sufficient exercise of the right of re-entry for condition broken. Lehigh Valley R.R. Co. v. Chapman, *supra*, Stewart v. Workman, *supra*.

[26] 1 AMERICAN LAW OF PROPERTY § 4.12 (A.J. Casner ed. 1952).

[27] McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946).

[28] 1 AM. LAW OF PROPERTY § 4.13 (A.J. Casner ed. 1952).

[29] *See* Pure Oil Co. v. Miller-McFarland Drilling Co., 376 Ill. 486, 34 N.E.2d 854 (1941); 1 L. SIMES and A. SMITH, THE LAW OF FUTURE INTERESTS § 284 (2d ed. 1956).

[30] 1 L. SIMES AND A. SMITH, *supra* note 29.

[31] 1 AMERICAN LAW OF PROPERTY § 4.12 (A.J. Casner ed. 1952).

[32] L. SIMES, FUTURE INTERESTS § 13 (2d ed. 1966).

[33] Commercial National Bank of Kansas City v. Martin, 185 Kan. 116, 340 P.2d 899 (1959); Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855); Prince v. Charles Ilfeld Co., 72 N.M. 351, 383 P.2d 827 (1963); 1 AMERICAN LAW OF PROPERTY § 2.8 (A.J. Casner ed. 1952).

outstanding estate, it is not liable to be void because of failure to vest within the period of the rule against perpetuities;[34] the possibility of reverter is merely a legal result of the fee simple determinable and if the law is to recognize the right to create such an estate it should not declare void a necessary part of it.[35]

At common law the possibility of reverter, like the right of re-entry for condition broken, was not alienable.[36] The reason most frequently given for such a holding was that to permit alienation of the possibility of reverter would be to encourage and facilitate the commission of the offense of maintenance and litigation.[37] The position has also been taken that such a future interest was too nebulous to be conveyed unless coupled with a reversion.[38] At the present time there seems to be some conflict of authority on the question of the alienability of a possibility of reverter,[39] but it

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[34] County School Bd. of Scott County v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950). This explanation seems to be unsatisfactory in view of the decisions in more recent cases which state that a possibility of reverter is considered to be an existing interest in land and not a mere possibility that an interest will arise in the future. See text accompanying note 31 *supra.*

[35] Mountain City Missionary Baptist Church v. Wagner, 193 Tenn. 625, 249 S.W.2d 875 (1952).

[36] Consolidated School Dist. No. 102 of Washington Co. v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954) (possibility of reverter); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962) (right of re-entry); London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951) (possibility of reverter); Pickens v. Daugherty, 217 Tenn. 349, 397 S.W.2d 815 (1966) (right of re-entry); County School Bd. of Scott County v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950) (possibility of reverter); Annot., 53 A.L.R.2d 224 (1957). The right of re-entry for condition broken is at the present time considered to be inalienable inter vivos in the majority of American jurisdictions. Annot., 53 A.L.R.2d 224 (1957). However, such a future interest has been held to be alienable inter vivos by virtue of statute. Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951); Carrington v. Goddin, 54 Va. (13 Gratt) 587 (1857). The statute which the Virginia Supreme Court of Appeals had under consideration in the two cases cited above is identical to W. VA. CODE ch. 36, art. 1, § 9 (Michie 1966) which provides that "[a]ny interest in or claim to real estate may be lawfully conveyed or devised." Thus, it would seem that a right of re-entry for condition broken should be alienable inter vivos under the above cited statute. *But see* White v. Bailey, 65 W. Va. 573, 64 S.E. 1019 (1909); Martin v. Ohio River R.R., 37 W. Va. 349, 16 S.E. 589 (1892).

[37] *E.g.*, Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946).

[38] Consolidated School Dist. No. 102 v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954); Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959).

[39] *Compare* Blackert v. Dugosh, 12 Ill. 2d 171, 145 N.E.2d 606 (1957) (possibility of reverter inalienable); Pure Oil Co. v. Miller-McFarland Drilling Co., 376 Ill. 486, 34 N.E.2d 854 (1941) (inalienable); Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959) (inalienable); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925) (inalienable); *with* London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951) (saying possibility of reverter alienable); Caruthers v. Leonard, 254 S.W. 779 (Tex. Com. App. 1923) (alienable). See also Annot., 53 A.L.R.2d 324 (1957).

appears that in a majority of jurisdictions, either by statute[40] or court decision,[41] a possibility of reverter is now considered to be alienable. And even in those jurisdictions in which a possibility of reverter is considered to be inalienable, it is not, as has sometimes been held in regard to a right of reentry,[42] destroyed by an attempted alienation of it.[43] In some jurisdictions which consider the possibility of reverter not to be an alienable interest, if the grantor purports to convey it during the continuance of the estate in fee simple determinable, it will, on termination of that estate, inure to the benefit of the grantee.[44]

The common law denied the attribute of devisability to both the possibility of reverter and right of re-entry for condition broken,[45]

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[40] Ricks v. Merchants Nat'l Bank & Trust Co., 191 Miss. 323, 2 So. 2d 344 (1941); County School Bd. of Scott County v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950) [applying statute indentical to W. VA. CODE ch. 36, art. 1, § 9 (Michie 1966)].

[41] Prince v. Charles Ilfeld Company, 72 N.M. 351, 383 P.2d 827 (1963); London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951); Collette v. Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); 1 AMERICAN LAW OF PROPERTY § 4.20 (A.J. Casner ed. 1957). The reasons for such holdings have been stated as follows:

> The basic reasons for these decisions was because our courts neither saw reason, logic, nor necessity for continuing the doctrine of a fuedal society in modern commercial and industrial times. The power to dispose of a possibility of reverter is in accord with sound public policy in the interests of modern civilization. London v. Kingsley, *supra* at 116, 81 A.2d at 873.

See Caruthers v. Leonard, 254 S.W. 779, (Tex. Com. App. 1923) (relying on the "more liberal tendency of the courts in matters of alienation.").

The West Virginia Supreme Court of Appeals has not passed on the question of the inter vivos alienation of a possibility of reverter, but it should be alienable inter vivos under W. VA. CODE ch. 36, art. 1, § 9 (Michie 1966) which provides that "[a]ny interest in or claim to real estate may be lawfully conveyed or devised." Under an identical statutory provision, VA. CODE ANN. § 55-1 (Repl. 1969), the Virginia Supreme Court of Appeals has held such a future interest to be alienable inter vivos. County School Bd. of Scott County v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950). *See* 4 L. SIMES AND A. SMITH, THE LAW OF FUTURE INTERESTS § 1860 (2d ed. 1956) (saying that "[s]tatutes which declare that all future interests are alienable would doubtless include the possibility of reverter"). Several West Virginia cases, although not expressly so holding, have indicated that a possibility of reverter would be alienable inter vivos. *See* Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944); United Fuel Gas Co. v. Hill, 112 W. Va. 10, 163 S.E. (1932); Burche v. Neal, 107 W. Va. 559, 149 S.E. 611 (1929).

[42] Rice v. Boston & W.R. Corp., 94 Mass (12 Allen) 141 (1858); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962); Annot., 53 A.L.R.2d 224 (1957).

[43] Consolidated School Dist. No. 102 v. Walter, 243 Minn. 149, 66 N.W.2d 881 (1954); Annot., 53 A.L.R.2d 224 (1957).

[44] *See* Annot., 53 A.L.R.2d 224 (1957).

[45] *E.g.,* London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951); Annot., 16 A.L.R.2d 1246 (1951).

both of which are now generally considered to be devisable.[46] In a majority of jurisdictions these interests are also now considered to descend at the death of the owner intestate,[47] and may be released to the holder of the fee simple determinable or fee simple subject to a condition subsequent thereby enlarging the estate in his hands to a fee simple absolute.[48] The possibility of reverter is not destroyed by the conveyance of the fee simple determinable before the occurrence of the event on which it is limited,[49] and, unlike the right of re-entry for condition broken, it cannot be the subject of a waiver by failure to assert it because no declaration of forfeiture or re-entry is necessary to terminate the fee simple determinable since it expires automatically on the occurrence of the event on which it is limited.[50] Such an interest is distinguished factually from the right of re-entry for condition broken by the language used to create each of the interests[51] and is distinguishable in legal effect by the fact that on occurrence of the event on which it is limited it takes effect in possession immediately while the right of re-entry does not become a possessory estate until the grantor, testator or his heirs elects to terminate the preceding estate.[52]

One final aspect of the fee simple determinable and possibility of reverter deserves some comment. As previously mentioned, the

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[46] London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951); Annot., 16 A.L.R.2d 1246 (1951). The Virginia Supreme Court of Appeals has held that a possibility of reverter and right of reentry for condition broken are devisable under a statute identical to W. VA. CODE ch. 36, art. 1, § 9 (Michie 1966). County School Bd. of Scott County v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950) (possibility of reverter); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930) (possibility of reverter and right of re-entry). And in the case of Carney v. Kain, 40 W. Va. 758, 23 S.E. 650 (1895), the West Virginia Supreme Court of Appeals, by way of dictum, said it was thought that a right of re-entry was devisable under the Statute of Wills.

[47] School Dist. No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964) (possibility of reverter); Fausett v. Guisewhite, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962) (right of re-entry for condition broken); London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951) (possibility of reverter).

[48] Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855) (possibility of reverter); *In Re* Application of Mareck v. Hoffman, 257 Minn. 222, 100 N.W.2d 758 (1960) (possibility of reverter); Trustees of Calvary Presbyterian Church of Buffalo v. Putnam, 249 N.Y. 111, 162 N.E. 601 (1928) (right of re-entry for condition broken); London v. Kingsley, 368 Pa. 109, 81 A.2d 870 (1951) (possibility of reverter); Atkin v. Gillespie, 156 Tenn. 137, 299 S.W. 776 (1927) (possibility of reverter).

[49] 1 AMERICAN LAW OF PROPERTY § 4.15 (A.J. Casner ed. 1957).

[50] Cases cited note 25 *supra.*

[51] Cases cited notes 11, 12, 24 *supra.* 1 AMERICAN LAW OF PROPERTY § 4.7 (A.J. Casner ed. 1957).

[52] 1 AMERICAN LAW OF PROPERTY § 4.12 (A.J. Casner ed. 1957). This conclusion is an obvious result of the nature of the fee simple determinable and the fee simple subject to a condition subsequent. See cases cited note 25 *supra.*

possibility of reverter is not subject to the rule against perpetuities, but such an interest can be created only in the grantor or the heirs of the testator.[53] Thus, when a fee simple determinable is created with a provision that the estate shall shift over to a third person on the occurrence of the event on which the estate is limited, an executory interest which is subject to the rule against perpetuities is created in the third person.[54] The question which often arises when such an interest is created in violation of the rule against perpetuities is, what effect will it have on the preceding estate.

Generally, when there is an invalid limitation over, the preceding estate will be unaffected by such invalid limitation.[55] Thus, it might seem in the case here suggested that the fee simple would become absolute in the first taker. However, the qualifying phrase, *e.g.* so long as, in an instrument creating a fee simple determinable is not considered to be a part of the limitation over; and if the limitation over fails because it violates the rule against perpetuities, the preceding estate remains merely a fee simple determinable and does not thereby become a fee simple absolute.[56] The grantor or the heirs of the grantor or testator will retain a possibility of reverter which

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[53] This conclusion follows from the definition of the possibility of reverter. See cases cited note 27 *supra;* 1 AMERICAN LAW OF PROPERTY § 4.12 (A.J. Casner ed. 1957).

[54] First Universalist Society of North Hampton v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); *In Re* Pruner's Estate, 400 Pa. 629, 162 A.2d 626 (1960); Roadcap v. County School Bd., 194 Va. 201, 72 S.E.2d 250 (1952). Such an estate has been referred to and defined as one which is conveyed or devised to one person, so that on the occurrence or failure of occurrence of a contingent event the estate shall pass from the original grantee or devisee to a third person. Lehigh Valley R.R. v. Chapman, 35 N.J. 177, 171 A.2d 653 (1961). In the case of such a conveyance or devise the limitation over cannot be a remainder because there is no particular estate which must first determine by its own limitation before the gift over can take effect and because the prior gift is of the entire fee there can be no remainder. Such a conveyance or devise does create an executory interest because it is a limitation of a fee after a fee, which by the rules of law cannot take effect as a remainder. Roadcap v. County School Bd., *supra.*

[55] First Universalist Society of North Adams v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855); Leonard v. Burr, 18 N.Y. (4 Smith) 99 (1858); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925).

56. McCrory School Dist. v. Brogen, 231 Ark. 664, 333 S. D. 2d 246 (1960); Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N.E.2d 922 (1950); First Universalist Society of North Adams v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Leonard v. Burr, 18 N.Y. (4 Smith) 99 (1858) ("[t]hese words are part of the devise itself."); *In Re* Pruner's Estate, 400 Pa. 629, 162 A.2d 626 (1960). It is of no consequence that the persons named in the invalid limitation over are the same ones who will take the possibility of reverter which passes under the residuary clause of a will which created the invalid limitation over, Brown v. Independent Baptist Church of Woburn, *supra.*